

# **TOWN OF HERNDON**



## **Purchasing Policy and Procedures**

**July 2007**

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## PROCUREMENT POLICY

The town purchasing section provides a centralized system for the acquisition of goods, services and construction and ensures that all goods and services are of appropriate quality, are acquired in a timely and cost effective manner at the least expense to the town. Policies and procedures of the purchasing section are regulated by, and must be generally consistent with certain provisions of with the Virginia Public Procurement Act of the Code of Virginia.

The intent of the Virginia General Assembly is set forth in the Virginia Public Procurement Act (Code of Virginia, Section 2.2-4300): "To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business, and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered. Since competition is sought to the maximum feasible degree, when conducted fairly and honestly, competitive procurement does not guarantee that a preferred brand or vendor will be selected: instead, that the most favorable prices will be obtained for that quality level which is specified.

The town through this policy intends to assure the best quality and price for products and services; to protect the assets and funds of the town; and to maintain sound professional relations with all suppliers within the Procurement Laws and Business Ethics as dictated by Federal, State, and the town governments. Nothing in this policy shall prevent the town from complying with the terms and conditions of any grant, bequest or cooperative agreement. Therefore the following policy for purchasing is hereby adopted by the town and shall take effect immediately.

## ARTICLE 1 - GENERAL PROVISIONS

### 1.1. Application

This policy applies to all contracts for goods, services, insurance and construction for every expenditure of funds appropriated by the town. This policy is established by official action of the town. All provisions of this policy are in conformance with Chapter 7, Sections 2.2-4300 to 2.2-4377 of the Code of Virginia as amended.

When the procurement involves the expenditure of Federal assistance or contract funds, nothing contained in these regulations shall prevent the town from complying with the terms and conditions of any grant, gift or bequest.

### 1.2. Effective Date.

An ordinance amending the town code to update town procurement procedures including definitions, cooperative procurement, tie bid procedures, internet postings of procurement, sole source procedures, small purchases and procurement bonds was adopted on May 22, 2007. Contracts entered into prior to passage of this policy shall continue to be governed by the procurement policy and regulations of the town in effect at the time those contracts were executed.

### 1.3 Definitions: For purposes of these regulations, the following terms have the meanings ascribed to them herein, except where the context clearly requires another meaning.

- A. Alternate Bid: An additional bid submitted where the bidder knows that it differs materially from the specifications.
- B. Amendment: A written instrument, issued by the procurement official, prior the openings of bids or receipt of proposals, to modify or interpret the invitation for bid or request for proposal and attachments, by additions, deletions or clarifications.
- C. Blanket Purchase Agreement: A procurement instrument under which a purchaser contracts with a local vendor to provide for a purchaser's low or erratic demand usage for small order requirements (item(s) or a service under the single quote limit) for an item(s) or a service, on an as-required and over-the-counter basis for a 12 month period.
- D. Brand Name or Equal Specification: A brand name specification to describe the standard of quality, performance, and other characteristics needed to meet the town requirements and which provides for the submission of equivalent products.
- E. Change Order: Written order signed by someone authorized under these regulations directing a contractor to make changes, which the changes clause of any contract authorizes to be ordered with or without the consent of the contractor.
- F. Confidential and Proprietary Information: Any information which is submitted as part of a bid or proposal and noted as proprietary by the bidder or offeror. Such information shall not be disclosed except to a person authorized to receive such information and is not a matter of public knowledge or available to the public on request.
- G. Contract: An agreement enforceable by law, between two or more competent parties, to do or not to do something not prohibited by law, for a consideration.

- H. Construction: Building, altering, repairing, improving or demolishing any structure or building, and any draining, dredging, excavation, grading or similar work upon real property.
- I. Emergency: A condition or occurrence of a sudden and unexpected nature threatening the public health, safety or welfare.
- J. Faith-based organization: A religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193.
- K. Gift: Any present or promised payment, loan, subscription, advance, deposit of money or service given, unless consideration of substantially equal or greater value is exchanged.
- L. Goods: All material, equipment, supplies, printing and automated data processing hardware and software.
- M. Immediate Family: A spouse, child, parent, brother, sister and any other person living in the same household as the town employee.
- N. Invitation for Bid: All documents, whether attached or incorporated by reference, used for solicitation of competitive sealed bids.
- O. Informality: A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or the request for proposal, which does not affect the price, quality, or delivery schedule for the goods, services or construction being procured.
- P. Nonprofessional Services: Any services not specifically identified as professional services within this policy.
- Q. Procurement file: A secure file, manual or electronic, with controlled access within the purchasing department or end user's department.
- R. Professional Services: Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law medicine, optometry, pharmacy, dentistry, professional engineering or actuarial services.
- S. Public Body: Any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this policy.
- T. Procurement official: Appointed by the town manager and assigned to the town's director of finance or other comparable town official as the town procurement official, who shall have general administrative and supervisory authority for the procurement process. The procurement officer may appoint one or more procurement officials to assist in carrying out the procurement functions of the town, subject to the supervision and control of the procurement officer.
- U. Request for quotation: A request for quote from one or more vendors under an open market procurement where the estimated cost is less than \$30,000.

- V. Request for proposals: All documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- W. Responsible Bidder or Offeror: A bidder or offeror that has the capability, in all respects, to fully perform the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been pre-qualified, if required.
- X. Responsive Bidder: A bidder that has submitted a bid which conforms in all material respects to the invitation to bid.
- Y. Services: Any service, to include time, labor or effort by a vendor, not involving the delivery of a specific end product or the rental of equipment, materials and supplies and reports incidental to the required performance. Services shall include maintenance of equipment. Services shall not include contracts for regular employment by the town.
- Z. Specification: Any description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing or preparing a good, service or construction item for delivery.
- AA. Supplies, Materials, Equipment and Commodities: Any goods, articles or things which will be used by or furnished to any department or other offices of the town.
- BB. Using Departments: All departments, agencies, boards and commissions of the town, including consolidated support services, and offices supported from funds approved by the town.

## ARTICLE 2 - OFFICE OF THE PROCUREMENT OFFICIAL

### 2.1 Establishment and Appointment.

The purchasing system shall operate under the direction and supervision of the procurement official in accordance with the provisions in this policy.

### 2.2 Authority and Responsibilities of the Procurement official.

- A. Authority. The procurement official shall serve as the principal public purchasing official for the town, and shall be responsible for the procurement of goods, services, insurance and construction in accordance with this policy, as well as the management and disposal of equipment.
- B. Responsibilities. In accordance with this policy the procurement official shall:
  1. Purchase or supervise the purchase of all goods, services, insurance and construction needed by the town.
  2. Establish and maintain programs for specification development, contract administration, inspection and acceptance in cooperation with the end user that has requested the goods, services, insurance or construction.
  3. Delegate authority to other the town officials for the purchase of goods, services or construction.
  4. Establish and promulgate procedures to carry out the provisions of this policy

5. Secure for the town the benefits of research done in the field of purchasing by other governmental jurisdictions, national societies, national trade associations and private businesses and organizations; and
6. Maintain a current file of sources of goods, services, insurance and construction to be known as a "bidder list" on which vendors can request to be included.

### 2.3 Delegation.

The procurement official may delegate purchasing authority, in writing, to purchase certain supplies, services, or construction items to other employees, if such delegation is deemed necessary for the effective procurement of those items.

## ARTICLE 3 - COOPERATIVE PROCUREMENT

### 3.1 Conditions for Use.

Pursuant to the authority granted by Section 2.2-4304 of the Virginia Code, the town may participate in, sponsor, conduct or administer a cooperative procurement agreement for the purpose of combining requirements to increase efficiency or reduce administrative expenses in the procurement process.

All cooperative procurement contracts entered into or used by the town shall be based on procurement principles contained in this policy.

Except for contracts for architectural and engineering services, the town may participate in or purchase goods and services through contracts awarded by other governmental bodies when it is determined by the procurement official that cooperative procurement is in the best interest of the town and the contract is based on competitive procurement principles.

## ARTICLE 4 - CONTRACT FORMATION AND METHODS OF SOURCE SELECTION

### 4.1 Competitive Sealed Bidding - Invitation for Bid

- A. Conditions for Use. All contracts with non-governmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction of Thirty Thousand Dollars (\$30,000) or more shall be awarded after competitive sealed bidding, or by such other procedures required or authorized by this policy.
- B. Pre-Qualification of Bidders. The procurement official is authorized to pre-qualify bidders prior to any solicitation of bids, whether for goods, services, insurance or construction. The application form used in such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. Such form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor be considered a trade secret or proprietary information pursuant to the requirements of Section 2.1-342.B.58 and 2.2-4342 of the Virginia Code.

In all instances in which the procurement official requires pre-qualification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of prequalification applications. The deadline for submission shall be sufficiently in advance of the date



set for the submission of bids for such construction so as to allow the procedures set forth in this subsection to be accomplished.

At least thirty (30) days prior to the date established for submission of bids or proposals under the procurement of the contract for which the pre-qualification applies, the procurement official shall advise in writing each contractor which submitted an application whether that contractor has been pre-qualified. If a contractor is denied pre-qualification, the written notification to such contractor shall state the reasons for such denial of pre-qualification and the factual basis of such reasons.

A decision by the procurement official denying pre-qualification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in 6.1 of this policy. The procurement official may deny pre-qualification to any contractor only if the procurement official finds one of the following:

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the procurement official shall be sufficient to establish the financial ability of such contractor to perform the contract resulting from such procurement;
  2. The contractor does not have appropriate experience to perform the construction project in question;
  3. The contractor or any officer, director or owner thereof has had judgments entered against him, her, or it within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;
  4. The contractor has been in substantial noncompliance with the terms and conditions of prior comparable construction contracts with any public body without good cause; provided however, the procurement official shall not deny prequalification to the contractor unless the facts underlying the substantial noncompliance were documented in writing and the contractor has been furnished a copy of the information thereto with the opportunity to respond;
  5. The contractor or any officer, director, owner, project manager, procurement official or chief financial official thereof has been convicted within the past ten (10) years of a crime related to governmental or nongovernmental construction or contracting.
  6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government; and
  7. The contractor failed to provide to the procurement official in a timely manner any information requested by the procurement official relevant to subdivisions 1 through 6 of this subsection.
- C. Notice of invitation to bid. Notice inviting bids shall be published in at least one newspaper with general circulation in the town. Publication shall occur at least ten (10) days preceding the last day set for the receipt of bids. The newspaper notice shall include a general description of the proposed purchase or sale and where bid documents may be obtained.

The procurement official shall also solicit sealed bids from prospective suppliers who have requested their names to be added to a "bidders list" which the procurement official shall maintain.

Invitations sent to vendors on the "bidders list" shall be limited to commodities that are similar in character and ordinarily handled by the trade group to which the invitations are sent. Placement on the "bidders list" is no guarantee of solicitation for bids and/or quotes.

The procurement official shall post pending purchases or sales by notice in the purchasing office.

- D. Use of Brand Names. Unless otherwise provided in the invitation to bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand name, make or manufacturer, but rather conveys the general style, type, character, and quality of the articles desired. At the sole discretion of the procurement official, any article to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted.
- E. Rejection of Bids and Waiver of Informalities. An invitation for bid, a request for proposal or any other solicitation, or any and all bids or proposals may be canceled or rejected in whole or in part. Informalities in bids may be waived when the procurement official determines that it is in the best interest of the town to do so. The reasons for cancellation or rejection of bids, solicitations or proposals or the waiver of any informality shall be made a part of the record in the matter.
- F. Bid Opening. All bids must be opened in public.
- G. Negotiation with Lowest Responsible Bidder. Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the procurement official may negotiate with the apparent low bidder to obtain a contract price within available funds; however, such negotiation may be undertaken only under conditions and procedures described in writing prior to issuance of the invitation to bid and summarized therein.
- H. Withdrawal of Bid Due to Error.
  - 1. A bidder for a construction contract may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn. The procedure for bid withdrawal must be stated in the advertisement.
    - a. The bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure and at the request of the procurement official shall submit original work papers with such notice; or
    - b. The bidder shall submit to the procurement official his original work papers, documents and materials used in the preparation of the bid within one day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. In either instance, such work papers, documents and materials shall be deemed a trade secret pursuant to Section 2.1-342.B.58 of the Virginia Code. The bids shall be opened one day following the time documented in the invitation for bid for the submission of bids. Thereafter, the bidder shall have two hours after the

opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded until the two-hour period has elapsed. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

2. Procedures for the withdrawal of bids for other than construction contracts may be established by the procurement official.
  3. No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent (5%).
  4. If a bid is withdrawn under the authority of this section, the lowest remaining bid shall be deemed to be the low bid.
  5. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.
  6. If the procurement official denies the withdrawal of a bid under the provisions of this section, he or she shall notify the bidder in writing stating the reasons for his decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder.
- I. Bid Award. Bids shall be awarded to the lowest responsive and responsible bidder. When the terms and conditions of the invitation for bid provide that multiple awards may be made, awards may be made to more than one bidder.

Unless canceled or rejected in accordance with Section 4.1(G) of this policy, a responsive bid from the lowest responsible bidder shall be accepted as submitted except as provided in Section 4.1(I) of this policy.

When the award is not given to the lowest bidder, a full and complete statement of the reasons for placing the order elsewhere shall be prepared by the procurement official and filed with the other papers relating to the transaction.

J. Tie Bids.

1. In the case of a tie bid, preference shall be given to goods, services and construction produced in the town or provided by persons, firms or corporations having principal places of business in the town, if such a choice is available.
2. Except as provided in Subsection A in the case of a tie bid, preference shall be given to goods, services and construction produced in Virginia or provided by Virginia persons, firms or corporations, if such a choice is available.
3. Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state preference, a like preference may be allowed to the lowest responsible bidder who is a resident of Virginia.
4. Notwithstanding the provisions of subsections 2 and 3, in the case of a tie bid in instances where goods are being offered, and existing price preferences have

already been taken into account, preference shall be given to the bidder whose goods contain the greatest amount of recycled content.

5. In the event that none of the foregoing provisions of this section resolve the tie, the procurement official may decide the tie by lot or cancel the solicitation and rebid.

K. Multi-Step Sealed Bidding.

When it is considered impractical to initially prepare a purchase description to support an award based on price, an invitation for bid be issued requesting the submission of un-priced offers. Bidders whose offers have been determined to be technically acceptable under the criteria set forth in the first solicitation shall be invited to submit priced offers.

L. Contract Pricing Arrangement.

Except in case of emergency affecting the public health, safety or welfare, no contract shall be awarded on the basis of cost plus a percentage of cost. A policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carriers administrative costs and retention stated in whole or part as a percentage of such claims, shall not be prohibited by this section. Architect/engineer and similar type contracts which are based on a percentage of construction costs shall not be prohibited by this section, providing the construction contract is not awarded by or to that architect/engineer or similar contracts.

M. Multi-Term Contracts

Specified Period. Unless otherwise provided by law, a contract for goods, services or insurance may be entered into for any period of time deemed to be in the best interest of the town provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefore.

N. Modification of the Contract.

1. Any contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five percent (95%) of the earned sum when payment is due, with not more than five (5%) being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.
2. Any subcontract for a public project which provides for similar progress payments shall be subject to the same limitations.
3. Nothing in this section shall preclude the procurement official from establishing retainage for contracts other than construction.

O. Bid Bonds on Construction Contracts. Except in cases of emergency, all bids or proposals for construction contracts in excess of One Hundred Thousand Dollars (\$100,000) shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do business in Virginia, as a guarantee that if the contract is awarded to such bidder, that bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent (5%) of the amount bid. Nothing in this section shall preclude the procurement official from requiring bid bonds to accompany bids or

proposals for construction contracts anticipated to be less than One Hundred Thousand Dollars (\$100,000).

No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bids for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.

P. Performance and Payment Bonds for Construction Contracts.

1. Upon the award of any construction contract exceeding One Hundred Thousand Dollars (\$100,000) awarded to any prime contractor, such contractor shall Furnish to the town the following bonds:
  - a. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract
  - b. A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work. "Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.
2. Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in Virginia.
3. Bonds shall be made payable to the town.
4. Each of the bonds shall be filed with the procurement official.
5. Nothing in this section shall preclude the procurement official from requiring payment or performance bonds for construction contracts below One Hundred Thousand Dollars (\$100,000).
6. Nothing in this section shall preclude such contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

Q. Action on Performance Bonds. No action against the surety on a performance bond shall be brought unless brought within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty, if the action be for such.

R. Action on Payment Bonds.

1. Subject to the provisions of subsection 2 hereof, any claimant who has performed labor or furnished material in accordance with the contract documents in the prosecution of work provided in any contract for which a payment bond has been given, and who has not been paid in full therefore before the expiration of ninety (90) days after the day on which such claimant performed the last of such labor or furnished the last of such materials for which

he or she claims payment, may bring an action on such payment bond to recover any amount due him for such labor or material, and may prosecute such action to final judgment and have execution on the judgment. The obligee named in the bond need not be named a party to such action.

2. Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond under (17)Q of this section, but who has contractor's payment bond only if he or she has given written notice to such contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he or she claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished.

Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond under (17) Q of this section, but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainage with respect to labor performed or materials furnished, shall not be subject to the time limitations stated in this subsection.

S. Alternative Forms of Security.

1. In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.
2. If approved by the town attorney, a bidder may furnish a personal bond, property bond, or bank or savings and loan association's letter of credit on certain designated funds in the face amount required for the bid, payment or performance bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the town equivalent to a corporate surety's bond.

T. Bonds for Other than Construction Contracts.

At the discretion of the procurement official bidders may be required to submit with their bid, a bid bond in an amount determined by the procurement official and specified in the invitation to bid, as a guarantee that if the contract is awarded to such bidder, that the Bidder will enter into the contract for the work mentioned in the bid. Additionally, the procurement official may require bid, payment, or performance bonds for contracts for goods or services if provided in the invitation to bid or request for proposal.

U. Insurance.

Vendors providing services will be required to carry adequate insurance to protect the town of Herndon from loss in case of accident, fire, theft, etc. throughout the term of the service contract. Proof of adequate insurance shall be furnished to the procurement official prior to acceptance of an award. The specific insurance requirements will be defined by Risk Management and will be included in the request for proposal or invitation to bid.

4.2 Competitive Negotiation.

A. Competitive Negotiation for Goods or Services Other Than Professional Services.

1. Conditions for Use.

- a. Upon a determination made in advance by the procurement official and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public; goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.
  - b. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the procurement official and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:
    - for the alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than \$500,000; or
    - for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.
2. Request for Proposal. The procurement official shall issue a written request for proposal indicating in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor.
3. Public notice. At least ten (10) days prior to the date set for receipt of proposals, public notice of the request for proposals shall be given by posting in a public area normally used for the posting of public notices, and by publication in a newspaper of general circulation in the area in which the contract is to be performed. In addition, the procurement officials or officer may also solicit proposals via other methods, such as by additional advertising or by contacting potential contractors
4. Receipt of Proposals. Proposals shall not be made public and shall be handled so as to not permit disclosure of the identity of any offeror or the contents of any proposal to competing offerors during the process of negotiation.
5. Selection and Award. Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the request for proposal, including price if so stated in the request for proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the town shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. Should the town determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror

B. Competitive Negotiation for Professional Services.

1. Conditions for Use. Contracts for professional services, as defined in section 1.3 of this policy, the aggregate cost of which the aggregate is expected to exceed Thirty Thousand Dollars (\$30,000), shall be entered into in the following manner. Services

estimated to cost less than Thirty Thousand Dollars (\$30,000) may be procured in accordance with the procedures for competitive sealed bidding, competitive negotiation for goods and services other than professional services, competitive negotiation for professional services or any other method that is authorized by this policy, at the discretion of the procurement official.

2. Request for Proposals. The procurement official shall issue a written request for proposal indicating in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor request for proposals shall not, however, request that offerors furnish estimates of man-hours or cost for services.
3. Public Notice. Public Notice of the request for proposal shall be given at least ten (10) days prior to the date set for receipt of proposals by publication in a newspaper of general circulation in the town. In addition, proposals may be solicited directly from potential contractors.
4. Selection and Award. The town shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial response and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. During the discussion stage, the town may discuss non-binding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, non-binding estimates of prices for services.

Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of the discussions, and upon the basis of evaluation factors published in the request for proposal and all information developed in the selection process, the town shall select, in the order of preference, two or more offerors whose professional qualifications and proposed services are deemed the most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the town can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiated at a fair and reasonable price. Should the town determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror

#### 4.3 Sole Source Procurement.

A contract may be awarded without competition when it is documented in writing that there is only one source practicably available for the required goods, services, insurance or construction item due to legal requirements, specific patents or copyrights, unique qualifications and skills, technical specifications or other reasons. It will be determined in writing that only one source was determined to be practicably available that identifies goods or services being procured, the contractor selected and the date on which the contract was or will be awarded. For purchases exceeding Thirty Thousand Dollars (\$30,000), a notice of intent to award shall be posted in the purchasing division on the day of award or the decision to award is announced, whichever occurs first.



#### 4.4. Emergency Purchases.

An emergency purchase may be necessary in order to protect personal safety, life or property, i.e., an occurrence of a serious, urgent and threatening nature that would demand immediate action to avoid termination of essential services or a dangerous condition. In such cases, a purchase order or contract may be awarded by the purchasing department without competitive bidding or competitive negotiation. However, such procurement shall be made with as much competition as is practicable under the circumstances. A written determination and justification establishing the basis for the emergency and for the selection of the particular contractor/vendor must be submitted by the requesting department to the procurement official prior to creating an obligation. The procurement official with the concurrence of the town, as appropriate, will approve or disapprove the purchase as an emergency procurement. The approved written determination shall become part of the procurement file. For purchases with a total cost in excess of Thirty Thousand Dollars (\$30,000) a written notice stating that the contract is being awarded, or has been awarded on an emergency basis shall be publicly posted for ten (10) calendar days, beginning on the day of the award or the decision to award is announced, whichever occurs first, or as soon thereafter as is practicable.

Notwithstanding the foregoing, if an emergency occurs at times other than regular business hours, the requesting department may purchase directly the required goods or contractual services. The requesting department shall, however, whenever practicable, secure competitive telephone bids and order delivery to be made by the lowest responsible bidder. The requesting department shall also, as soon as practicable, submit to the procurement official a tabulation of bids received, if any, a copy of the delivery record and a written explanation of the circumstances of the emergency.

#### 4.5 Small Purchases.

Purchases, where the estimated total cost of the materials, equipment, supplies, shipping, insurance, construction, or service is not expected to exceed Thirty Thousand Dollars (\$30,000) may be awarded in accordance with procedures delineated in the purchasing procedures manual developed by the procurement official. Small purchase procedures shall include but are not limited to the following provisions:

- A. Less than \$2,500 – no quotations required
- B. \$2,500 or more but less than \$10,000 – minimum of three (3) verbal or written quotations.
- C. \$10,000 or more but less than \$30,000 – minimum of four (4) written quotations.
- D. Nothing in this section shall preclude the procurement official from requiring more stringent procedures for purchases made under the small purchase method.

#### 4.6 Collusion among Bidders.

More than one bid from an individual, firm, partnership, corporation or association under the same or different name will be rejected. Reasonable grounds for believing that a bidder is interested in more than one bid for the work contemplated will cause rejection of all bids in which the bidder is interested. Any or all bids may be rejected if there is any reason to believe that collusion exists among the bidders. Participants in such collusion may not be considered in future bids for the same work. Each bidder, as a condition of submitting a bid, shall certify that he, she or it is not a party to any collusive action as herein defined.

#### 4.7 Unauthorized Purchases.

- A. Whenever any officer or employee of the town purchases or contracts for any supplies or services contrary to the provisions of the purchasing procedure or this policy, such

purchases or contract shall be void and shall not be considered to be an obligation of the town.

- B. Any the town officer or employee making or approving a purchase contrary to the provision of the purchasing procedures or this policy shall be personally liable for the costs of such purchases or contract. If already paid out of the town funds, the amount thereof may in the name of the town, be recovered by appropriate legal action.

#### 4.8 Competitive Bidding or Competitive Negotiation on State-Aid Projects.

No contract for the construction of any building or for an addition to or improvement of an existing building by the town for which state funds of \$30,000 or more, either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under Section 4.2(1) A, 2. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to the Virginia Public Procurement Act, Sections 2.2-4300 et seq. A person or firm who has been engaged as an architect or engineer for the same project under a separate contract shall not be eligible to bid on or submit a proposal for any such contract or to have the contract awarded to him.

#### 4.9 Disposal of Surplus Property

- A. Town departments shall submit to the procurement official at such time and in such form as prescribed, reports of items which are no longer useable or which have become obsolete, worn or scrapped.
- B. The procurement official shall have the authority to redistribute surplus property according to classification:
  - 1. Items of value for transfer, trade-in, or sale
  - 2. Scrap items which have sale value of material content only.
  - 3. Items classified as toxic or hazardous and require special handling.
  - 4. Items for destruction or abandonment that are unusable and no commercial value.
  - 5. Disposal of confiscated or abandoned property in the hands of the police.
- C. Disposal methods:
  - 1. Transfer within the town to other departments.
  - 2. Transfer/sell to another public jurisdiction. Sales to other public jurisdictions should be made at the items' fair market value.
  - 3. Public sales or auctions:
    - a. Auction: The preferred method of sale to the general public. Advertisements are placed in local and widely circulated newspapers in the vicinity of the auction sale.
    - b. Sales by competitive bid: Sale of items may be through competitive bids, whenever feasible, to obtain the highest bid. The procurement official may require sealed bids, at his or her discretion.

4. Donations:

- a. With the procurement official's approval, surplus items with a market value of less than \$500 may be donated directly to a charitable or non profit organization or public body as appropriate and allowed by law for a public benefit. Non-profit organizations must provide a copy of the Non-Profit Federally Tax Exempt Incorporation Certificate and an itemized receipt certifying their acceptance of surplus items.

5. Trade-Ins and other methods of disposal:

- a. Trade-Ins: Trade-in items are not required to be declared surplus and may be traded in on the purchase of equipment of the same general commodity class code. Trade-in procedures should not be used if the monetary allowance offered is substantially below the known current sales range. If market values are not known, recent sales prices may be obtained by contacting the State Surplus Property Office. Town property may not be used as credit on future purchases or to pay for a service provided to another public jurisdiction.
- b. Destruction or Abandonment: Property which is unusable and determined to have no commercial value or the cost of sale would exceed expected return may be destroyed or abandoned with prior written approval of the procurement official. Burning is an example of destruction; dumping at a certified landfill is an example of abandonment. These are necessary methods of disposal, but the actions must be controlled and documented to conform to proper property management and avoid abuse.
- c. Hazardous material: Federal and State laws have been enacted placing strict compliance requirements of the disposal of hazardous materials. Examples of hazardous materials include janitorial cleaning supplies, paint, developer and toner for copy machines, automotive antifreeze, etc. Any public jurisdiction that generates 220 pounds or 25 gallons of hazardous materials in one month is considered to be a "generator" by Federal definition and is required to comply with these statutes. Public jurisdictions are advised to contact the Department of Environmental Quality (DEQ) for technical assistance, copies of applicable regulations, and permit applications for registering with the Environmental Protection Agency (EPA) and for obtaining information to prepare appropriate manifests used in transporting materials.

Hazardous materials must be disposed of by contracting with contractors qualified in the proper identification, packaging/labeling and transporting of materials to EPA authorized storage sites. Public jurisdictions that generate substantial quantities should have a hazardous waste management plan in effect under the responsibility of a qualified staff specialist. Under current Federal statutes, public jurisdictions are held responsible for all hazardous materials, even after having been delivered to an EPA authorized storage facility. It is important, therefore, that careful and thorough planning be conducted prior to entering into a contractual arrangement. Costs can be minimized by public jurisdictions that have an effective program established with all waste materials fully identified and properly stored pending final packaging and delivery by an EPA-registered transporter.

Some surplus items require special handling and/or documentation for disposal. The special handling or documentation may be required by law, regulations or a management decision. Examples of such items would be certain containers, firearms and the like.

- d. Purchases by Town Employees: Town employees and members of their immediate family are not eligible to purchase surplus property from the town.

#### 4.10 Public Access to Procurement Information.

- A. Except as provided herein, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act. Cost estimates relating to a proposed transaction prepared by or for the town shall not be open to public inspection.
- B. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the town decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract.
- C. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal proposals are completed, but prior to award, except in the event the town decides not to accept any of the proposals and to reopen the contract. Subject to the provisions of this Section, proposal records shall be open to public inspection after award of the contract. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.
- D. Pursuant to Section 2.2-4342 of the Code of Virginia, trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or pre-qualification application shall not be subject to public disclosure under the Virginia Freedom of Information Act; however, the bidder, offeror or contractor must invoke the protections of this section prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary.

#### 4.11 Employment Discrimination by Contractor Prohibited.

Every contract of over \$10,000.00 shall include the provisions contained in subsections (B) and (C) below:

- A. During the performance of this contract, the contractor agrees as follows:
- B. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin, except where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
- C. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an Equal Opportunity Employer.

- D. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.
- E. The contractor will include the provisions of the foregoing paragraphs B, C and D in every subcontract or purchase order over \$10,000.00 so that the provisions will be binding upon each subcontractor or vendor.

#### 4.12 Federal Immigration Reform and Control Act of 1986

The contractor will certify that it does not and will not during the performance of the contract violate (i) the provisions of the Federal Immigration Reform and Control Act of 1986, as amended, and § 40.1 – 11.1, Code of Virginia, which prohibits the employment of illegal aliens, and (ii) the provisions of Federal and State employment and wage hour laws.

#### 4.13 Exemptions.

- A. Purchases under \$2,500
- B. The following selected categories of goods and services valued at \$30,000 or less:
  - 1. Books, pre-printed materials, reprints and subscriptions (print or electronic), pre-recorded audio and video cassettes, compact discs, slide presentations and the like, when only available from the publisher/producer
  - 1. Academic/research consulting services
  - 2. Honoraria, entertainment (speakers, lecturers, musicians, performing artists)
  - 3. Training that is specialized, proprietary, not typically available to the general public for which competition is generally unavailable, off-site, and requires a registration fee
  - 4. Royalties and film rentals when only available from the producer or protected distributors
  - 5. Professional organization membership dues
  - 7. Writers work
  - 8. Artists (does not include graphic artists) work and original works of art
  - 9. Photographers work other than for graduations and yearbooks, e.g., for official photographs/portraits
  - 10. Advertisements such as in newspapers, magazines, journals, radio, television, etc.
  - 11. Utility charges
  - 12. Conference facilities (to include conference support and related lodging and meals only when the use of a specific facility is directed by an outside donor, sponsor, or organization for the purchase of conference facilities under all other conditions)

13. Purchases of used equipment
14. Purchases from the federal government, other states and their agencies or public institutions and public bodies
15. Purchases \$30,000 or less for testing or evaluation
16. Purchases of legal services or expert witnesses or other services associated with litigation or regulatory proceedings
17. Emergency purchases
18. Sole source purchases

## ARTICLE 5 - GENERAL BUSINESS PRACTICES

### 5.1 Authority to Debar or Suspend.

After ten (10) days written notice to the person involved and with no legal action taken by that person per 6.8 of this policy, the procurement official may debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years. The procurement official may suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment. The suspension shall not be for a period exceeding six months. When debarment or suspension occurs, such debarment or suspension shall be considered to be just cause for cancellation of any existing contracts held by the person or business debarred or suspended.

The causes for debarment or suspension shall include:

- A. Conviction for commission of a criminal offense relating to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
- B. Conviction under state or Federal statutes for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty;
- C. Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
- D. Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract;
- E. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; however, failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
- F. Any other cause determined to be as serious and compelling as to affect responsibility as a town contractor, including debarment or suspension by another governmental entity for any cause in this policy; and for violation of the ethical standards set forth in this policy.

5.2 Decision to Debar or Suspend.

The procurement official shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken and inform the debarred or suspended person involved of his/her rights concerning judicial review.

5.3 Notice of Decision.

A copy of the decision required by 5.2 shall be final and conclusive unless legal action is taken by the debarred or suspended person as provided for in 6.8 of this policy.

ARTICLE 6 - APPEALS AND REMEDIES FOR BID PROTESTS

6.1 Ineligibility of Bidder, Offeror or Contractor.

- A. Any bidder, offeror, or contractor refused permission to, or disqualified from participation in public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the procurement official shall (i) notify the bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within ten (10) business days after receipt of the notice.
- B. Within ten (10) business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The procurement official shall issue its written determination of disqualification or ineligibility based on all information in the possession of the public body, including any rebuttal information, within ten (10) business days of the date the public body received such rebuttal information.
- C. If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the procurement official shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or should be disqualified from participation in the public contract, the public body shall so notify the bidder, offeror or contractor. Such notice shall state the reasons for the action taken. This decision shall be final unless the bidder, offeror, or contractor appeals within ten (10) days of receipt by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364 of the *Code of Virginia*.
- D. If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statute or regulations, the sole relief shall be restoration of eligibility (*Code of Virginia*, § 2.2-4357).

6.2. Appeal of Denial of Withdrawal of Bid.

- A. A decision denying withdrawal of bid under the provisions of § 2.2-4330 of the *Code of Virginia* shall be final and conclusive unless the bidder appeals the decision within ten (10) days after receipt of the decision by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364 of the *Code of Virginia*.
- B. If no bid bond is posted, a bidder refused withdrawal of a bid under the provisions of the *Code of Virginia*, § 2.2-4330, prior to appealing, shall deliver to the town a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and

the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

- C. If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statute or regulations, the sole relief shall be withdrawal of bid (*Code of Virginia*, § 2.2-4358).

6.3. Determination of Nonresponsibility:

- A. Following public opening and announcement of bids received on an invitation to bid, the procurement official shall evaluate the bids based upon the requirements set forth in the IFB, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability (*Code of Virginia*, § 2.2-4301, definition of competitive sealed bidding). At the same time, the town shall determine whether the apparent low bidder is responsible. If the town so determines, then it may proceed with an award to the lowest responsive and responsible bidder (*Code of Virginia*, § 2.2-4301, definition of competitive sealed bidding). If the procurement official determines that the apparent low bidder is not responsible, it shall proceed as follows:
  - 1. Prior to the issuance of a written determination of nonresponsibility, the procurement official shall (i) notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within five (5) business days after receipt of the notice.
  - 2. Within ten (10) business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The procurement official shall issue its written determination of responsibility based on all information in the possession of the procurement official, including any rebuttal information, within five (5) business days of the date the procurement official received such rebuttal information. At the same time, the procurement official shall notify, with return receipt requested, the bidder in writing of its determination.
  - 3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten (10) days after the receipt of the notice, by invoking administrative procedures meeting the standards of the *Code of Virginia*, § 2.2-4365, if available, or in the alternative by instituting legal action as provided in the *Code of Virginia*, § 2.2-4364.
  - 4. The provisions of this subsection shall not apply to procurements involving the prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that such bidders are not responsible.
- B. If, upon appeal pursuant to the *Code of Virginia*, § 2.2-4364 or § 2.2-4365, it is determined that the action taken was capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the invitation for bids, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question. If it is determined that the decision of the procurement official was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the invitation for bids, and the award of the contract has been made, the relief shall be as set forth in § 2.2-4360B of the *Code of Virginia*.



- C. A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under § 2.2-4360 of the *Code of Virginia*.
- D. Nothing contained in this section shall be construed to require a procurement official, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

#### 6.4 Protest of Award or Decision to Award.

- A. Any bidder or offeror may protest the award or decision to award a contract by submitting such protest in writing to the town no later than ten (10) days after public notice of the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the procurement official in the manner prescribed in the terms or conditions of the IFB or RFP. Any bidder, offeror, or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit such protest in the same manner no later than ten (10) days after posting or publication of the notice of such contract as provided in 3.18c. The written protest must be received in the purchasing office no later than 5:00 p.m. on the tenth day. If the tenth day falls on a weekend or an official holiday, the ten-day period expires at 5:00 p.m. on the next regular workday. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction, then the time within which the protest must be submitted shall expire ten (10) days after those records are available for inspection by such bidder or offeror, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The procurement official shall issue a decision in writing within ten (10) days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten (10) days of receipt of the written decision by invoking administrative procedures under § 2.2-4365 of the *Code of Virginia*, or in the alternative by instituting legal action under § 2.2-4364 of the *Code of Virginia*. Nothing in this subsection (§ 2.2-4364) shall be construed to permit a bidder to challenge the validity of the terms or conditions of the invitation for bids or request for proposals.
- B. If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The town shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the town may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits (*Code of Virginia*, § 2.2-4360).
- C. When the town determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption the town may enjoin the award of the contract to a particular bidder (*Code of Virginia*, § 2.2-4360).

6.5 Effect of Appeal upon Contract.

Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith in accordance with this policy shall not be affected by the fact that a protest or appeal has been filed.

6.6 Stay of Award During Protest.

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, no further action to award the contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

6.7 Contractual Disputes.

- A.. Contractual claims, whether for money or other relief, shall be submitted to the procurement official in writing no later than 60 days after final payment; however, written notice of the contractor's intention to file a claim for compensation above that required by the contract shall be given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing in this subsection shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods.
- B. The procurement official shall render a final decision on any such claim within 60 days of its submission or within 120 days after final payment, whichever is later. Failure by the procurement official to render a decision shall be deemed a denial of the claim as of the latest date a response was required.
- C. The decision of the procurement official shall be final and conclusive unless the contractor appeals in accordance with section 30-316, Herndon Town Code.

6.8 Legal Actions.

If injunctive relief is granted, the court, upon request of the public body, shall require the posting of reasonable security to protect the public body. In the event the apparent low bidder, having been previously determined by the public body to be not responsible in accordance with § 2.2-4301, is found by the court to be a responsible bidder, the court may direct the public body to award the contract, forthwith, to such bidder in accordance with the requirements of the *Code of Virginia* and the invitation for bids. A contractor may bring an action involving a contract dispute with a public body in the appropriate circuit court. A bidder, offeror, or contractor need not utilize administrative procedures meeting the standards of § 2.2-4365 of the *Code of Virginia*, if available, but if those procedures are invoked by the bidder, offeror, or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the public body agrees otherwise. Nothing herein shall be construed to prevent a public body from instituting legal action against a contractor (*Code of Virginia*, § 2.2-4364).

ARTICLE 7 - EQUAL OPPORTUNITY, MINORITY BUSINESS ENTERPRISES

7.1 Equal Opportunity and Non-Discrimination.

The town of Herndon shall not discriminate against any person on the basis of race, religion, color, sex, national origin, age, disability or other basis prohibited by state law.

7.2 Minority Business Enterprises.

The town shall include businesses selected from a list made by the Department of Minority Enterprise.

7.3 Faith-based Organizations

The town shall not discriminate against faith-based organizations in accordance with Section 30-318, town code.

## ARTICLE 8 - ETHICS IN PUBLIC CONTRACTING

8.1 Purpose.

The provisions of this article supplement, but do not supersede, other provisions of law including, but not limited to the following acts contained within the Code of Virginia, the Comprehensive Conflict of Interests Act (Sections 2.1-599 et seq.), the Virginia Governmental Frauds Act (Section 18.2-498.1 et seq.), and Articles 2 and 3 of Chapter 10 of Title 18.2 of the Code of Virginia as amended. The provisions of this article apply notwithstanding the fact that the conduct described may not constitute a violation of the Comprehensive Conflict of Interests Act.

8.2 Definitions.

The words defined in this section shall have the meanings set forth below throughout this article.

"Immediate family" shall mean spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.

"Official responsibility" shall mean administrative or operating authority, whether intermediate or final, to initiate, approve, and disapprove or otherwise affect a procurement transaction, or any claim resulting therefore.

"Pecuniary interest arising from the procurement" shall mean a material financial interest as defined in the Comprehensive Conflict of Interests Act.

"Procurement transaction" shall mean all functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

"Employee" shall mean any person employed by a procurement official of the town, including elected officials and appointed members of governing bodies.

8.3 Proscribed Participation by Employees in Procurement Process.

No employee having official responsibility in a procurement transaction shall participate in that transaction on behalf of the procurement official when the employee knows that:

- A. The employee is contemporaneously employed by a bidder, offeror, or contractor involved in a procurement transaction.
- B. The employee, or the employee's spouse, child, parent, brother, sister or any other person living in the same household as the employee holds a position with a bidder, offeror or

contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in a procurement transaction, or owns or controls an interest of more than five (5) percent.

- C. The employee, or the employee's spouse, child, parent, brother, sister or any other person living in the same household as the employee has a pecuniary interest arising from a procurement transaction.
- D. The employee, or the employee's spouse, child, parent, brother, sister or any other person living in the same household as the employee is negotiating, or has an arrangement concerning, prospective employment with the bidder, offeror or contractor.

#### 8.4 Disclosure of Subsequent Employment.

No employee or former employee having official responsibility for a procurement transaction shall accept employment with any bidder, offeror or contractor with whom the employee or former employee dealt in an official capacity concerning procurement transactions for a period of one (1) year from the cessation of employment with the town, unless the employee or former employee provides written notification to the town prior to commencement of employment by that bidder, offeror or contractor.

#### 8.5 Prohibition on Solicitation or Acceptance of Gifts.

- A. No employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is exchanged.
- B. No bidder, offeror, contractor or subcontractor shall confer a gift upon any town employee having official responsibility for the procurement transaction.

#### 8.6 Kickbacks

- A. No bidder, offeror, contractor or subcontractor shall demand or receive from any of his suppliers or subcontractors, as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything present or promised unless consideration of substantially equal or greater value is exchanged.
- B. No contractor or supplier shall make, or offer to make, kickbacks as described in this section.
- C. No person shall demand or receive any payment, loan, subscription, advance, deposit of money services or anything of value in return for an agreement not to compete on a contract.
- D. If a contractor or supplier makes a kickback or other prohibited transaction as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order, and ultimately borne by the town and will be recoverable from both the maker and the from other offending parties.

#### 8.7 Purchase of Building Materials, etc., from Architect or Engineer Prohibited.

- A. No building materials, supplies or equipment for any building or structure constructed by or for the town shall be sold by or purchased from any person employed as an independent

contractor by the town to furnish architectural or engineering services, but not construction for such building or structure; or from any partnership, association, or corporation in which such architect or engineer has a personal interest as defined in Section 2.1-639.2 of the Code of Virginia.

- B. No building materials, supplies or equipment for any building or structure constructed by or for the town shall be sold by or purchased from any person who has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in such building or structure to the independent contractor employed by the town to furnish architectural or engineering services in which such person has a personal interest as defined in Section 2.1-639.2 of the Code of Virginia.
- C. The provisions of this section shall not apply in the case of an emergency.

#### 8.8 Misrepresentations by Employees.

No employee having official responsibility for a procurement transaction shall knowingly falsify, conceal, or misrepresent a material fact; knowingly make false, fictitious or fraudulent statements or representations; or make or use any false writing or documents knowing the same to contain any false, fictitious or fraudulent statement or entry.

#### 8.9 Prohibition on Disclosing Procurement Information Prior to Award.

Town employees shall not, other than as provided by law, knowingly disclose bid and proposal information submitted by bidders and offerors, or screening committee information prior to the award of the contract to which the information relates without prior approval of the procurement official.

#### 8.10 Penalty for Violation.

Upon conviction of a willful violation of ethics in the public contracting provisions under Section 2.2-4377 of the Code of Virginia, any employee, in addition to any other fine or penalty provided by law, shall forfeit their employment.